1992

Society of Separationists, INC., a Maryland non-profit corporation; Richard Andrews and J. Walker v. Ron Whitehead, Tom Godfrey, Nancy Pace, Alan Hardman, Roselyn Kirk and Don Hale, Members Salt Lake Council : Amicus Brief

Utah Supreme Court

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920233

IN THE SUPREME COURT

OF THE STATE OF UTAH

SOCIETY OF SEPARATIONISTS, INC., a Maryland non-profit corporation; RICHARD ANDREWS; and J. WALKER,	:	
Plaintiffs-Appellees,	:	
vs.	:	
RON WHITEHEAD, TOM GODFREY, NANCY PACE, ALAN HARDMAN, ROSELYN KIRK and DON HALE, Members Salt Lake Council,	:	Case No. 920233
Defendants-Appellants.	:	

BRIEF OF AMICUS CURIAE

RICHFIELD CITY, THE UTAH LEAGUE OF CITIES AND TOWNS, ET AL

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK, GRANTING THE PLAINTIFFS' SUMMARY JUDGMENT MOTION AND DENYING THE DEFENDANTS' CROSS-SUMMARY JUDGMENT MOTION FINDING THE LEGISLATIVE PRAYERS OF THE SALT LAKE CITY COUNCIL TO BE IN VIOLATION OF ARTICLE I, SECTION 4, OF UTAH'S CONSTITUTION AND PERMANENTLY ENJOINING FUTURE LEGISLATIVE PRAYERS BY THE SALT LAKE CITY COUNCIL.

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ADDITIONAL PARTIES

The following additional parties join in the Amicus Brief of Richfield City and the Utah League of Cities and Towns, which cities and towns have made similar legislative determinations to open their council meetings with prayer.

West Valley City

Sandy City

City of St. George

Riverton City

Bountiful City

Heber City

Roosevelt City

Glenwood Town

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

CASE LAW

JURISDICTION

Pursuant to Section 78-2-2, Utah Code Annotated, as amended, jurisdiction over this matter lies with the Utah Supreme Court.

STATEMENT OF ISSUES ADDRESSED IN AMICUS BRIEF

and

STANDARD OF APPELLATE REVIEW

The sole issue addressed in this Brief of the Amicus Curiae is the constitutional propriety the District Court's granting of Plaintiffs' Motion for Summary Judgment and denial of the Defendants' Motion for Summary Judgment.

The standard of appellate review in summary judgment matters has been succinctly stated by the Utah Supreme Court as follows:

> In considering an appeal from a grant of summary judgment, we view the facts in a light most favorable to the losing party below. (Citations omitted.) And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, we give no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness. (Citations omitted.)

Blue Cross and Blue Shield vs. State, 779 P.2d 634, 636 (1989).

DETERMINATIVE CONSTITUTIONAL PROVISIONS

First Amendment, Constitution of the United States

> Congress shall make no law respecting an establishment of religion, or prohibiting the

> free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, Section 4, Constitution of Utah

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. . . .

STATEMENT OF THE CASE

This action began on September 26, 1991, when the Plaintiffs filed an action against the Defendants seeking to enjoin the Defendants from expending "any public funds, resources or property in support of prayers" at the Defendants' city council meetings and to enjoin the Defendants from "allowing or having prayers at City Council meetings." The Plaintiffs also sought a judgment declaring all past expenditures by the Defendants for such activities to have been in violation of Article I, Section 4, Constitution of Utah. The Plaintiffs also sought their costs.

The proceedings below included exchanges of discovery information that led to cross motions for summary judgment. The

District Court issued a Memorandum Decision on March 2, 1992, which was subsequently followed by an Order Granting Summary Judgment on April 9, 1992, wherein the Plaintiffs' Motion for Summary Judgment was granted and the Defendants' Motion for Summary Judgment was denied. The Defendants were thereby enjoined from allowing or having prayers at the Salt Lake City Council's meetings and from expending public funds, resources or property to support or encourage prayers. The Defendants were also ordered to pay the Plaintiffs' costs.

A Notice of Appeal was filed by the Defendants on May 1, 1992.

STATEMENT OF FACTS

For purposes of this Amicus Brief, and in light of the standard of appellate review which requires the court to view the facts in a light most favorable to the losing party below, the Amicus Curiae adopts verbatim the entire statement of "Undisputed Facts" in the Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment. (Record pages 192 through 203.) However, only those particular paragraphs referred to in the Amicus Brief, without footnotes or attachments, will be stated below:

> 1. On March 4, 1895, as commanded by the Enabling Act, delegates from across Utah convened for Utah's final Constitutional Convention. The Convention was opened with a prayer offered by President George Q. Cannon of the Church of Jesus Christ of Latter-day Saints. (Proceedings, p. 9.) Over the next 66 days the delegates had 55 public business meetings. On 54 of those days prayers were offered. At least 31 assorted ministers, reverends and elders representing at least 14 different religious congregations gave

prayers. Two military chaplains, a lieutenant from the Salvation Army and 18 different delegates also led the Convention in prayer. (A compilation of the prayer information is attached and incorporated as Exhibit "B".) Among the different churches represented in prayer were Methodist Episcopalians, Presbyterians, Lutherans, Mormons, Baptists, African Methodist Episcopalians, Unitarians, Scandinavian Methodist Episcopalians, Swedish Lutherans, Congregationalists and the just plain vanilla Episcopalians. (Memorandum in Support of Defendants' Motion for Summary Judgment, paragraph 2, Record pages 192 and 193.)

2. The Convention made it clear that the wide variety of religious faiths and other sentiments represented in their opening ceremonies was representative of the diverse beliefs of the community and the Convention's spirit of religious tolerance and freedom:

> MR. CANNON: Mr. President, I move the name of the church of which the reverend gentleman offering prayer is a member be inserted after his name, and I would like to request that this be done in each case since the opening of the Convention. I find by reference to our minutes of the first day, the name of the gentleman who offered prayer and also the church with which he is associated was given, and I think this should be done in each case, the object of the mover of the motion having been to show to the public that a freedom of religious sentiment prevailed in the Convention.

Proceedings, p. 105. (Emphasis added.) (Memorandum in Support of Defendants' Motion for Summary Judgment, paragraph 3, Record pages 193 and 194.)

3. The first session of the State Legislature which occurred after the adoption of the 1895 Constitution (including Article I, Section 4) and admission of Utah as a State by the United States Congress, occurred on January 6, 1896. Both the Special Session called to fix the date for the General Session, and the General Session itself, were opened with prayers. (See Journal of the House, pp. 16 and 29, which are part of Exhibit "E" attached and incorporated by reference.) To the best of the City's knowledge, the practice of opening legislative sessions with prayer has continued to this date. (Memorandum in Support of Defendant's Motion for Summary Judgment, paragraph 13, Record pages 197 and 198.)

SUMMARY OF ARGUMENTS

POINT I: Legislative Prayer Does Not Violate The Constitution of the United States.

In United States Supreme Court decisions over the last decade the right to conduct legislative prayers has been consistently found to not violate the First Amendment to the United States Constitution.

POINT II: Legislative Prayer Does Not Violate The Constitution of the State of Utah.

The Utah Supreme Court should go beyond the Federal Constitution and determine how Utah's Constitution affects legislative prayer.

Utah's Constitution, as a document, is ambiguous in its treatment of legislative prayer. The drafter's intent should be reviewed. The drafters' behavior, which evidences their intent, was such that no absolute, unconditional bar to legislative prayer can be reasonably inferred. Instead, the drafters appear to have intended to create only an establishment clause protection. When this protection is applied to legislative prayer in city council meetings, no real threat that a state religion will be established exists and, consequently, legislative prayers should be allowed.

Utah case law on this issue further supports an establishment clause protection interpretation, rather than an absolute, unconditional bar. This conclusion is further supported by reviewing Washington's interpretations of a similar constitutional provision.

Finally, the absolute, separationist views of the Plaintiffs and the trial court go too far. Such a view would require a finding that anything religion based, such as Utah's Pioneer Day and Christmas Day holidays would have to be unconstitutional, because they bestow obvious benefits on the Mormon Church and on the Christian religion.

Legislative prayers as conducted by Salt Lake City or any similarly situated city or town should not be found to be unconstitutional. They do not violate Utah's Constitutional establishment clause provision.

ARGUMENT

I. Legislative Prayer Does Not Violate the Constitution of the United States.

The United States Supreme Court has unequivocally ruled that legislative prayer does not violate the Establishment Clause of the First Amendment of the Federal Constitution. Marsh vs. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

The Marsh case involved the Nebraska Legislature's practice of beginning each of its sessions with a prayer, offered by a paid clergyman, who was selected by an agent of the legislature. A member of the legislature sued to enjoin the practice as violative of the First Amendment. The trial court ruled that the prayers were non-violative, but that payment of the chaplain from public funds was violative. The Eighth Circuit Court of Appeals reviewed the entire matter and applied the three-part test of Lemon vs. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and ruled that the use of the paid

clergy violated the Lemon test. The United State Supreme Court reversed this decision.

In Marsh, Chief Justice Burger begins his analysis by a summary of the history of legislative prayer, as follows:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.
>
> . . .
>
> Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.
>
> . . .
>
> Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood. . . .

Marsh, 463 U.S. at 786-789.

He then states that although historical patterns cannot justify contemporary violations of constitutional guarantees, they do

reveal the drafter's intent. Marsh, 463 U.S. at 790. He finally concludes that

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Marsh, 463 U.S. at 792.

In the United States Supreme Court's most recent prayer ruling, Lee vs. Weisman, 60 L.W. 4723 (1992), wherein the court struck down the practice of prayer at high school graduations, it reaffirmed the constitutional nature of legislative prayers, wherein it stated as follows:

> Inherent differences between the public school system and a session of a State Legislature distinguish this case from Marsh v. Chambers, 463 U.S. 783 (1983). The considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in Marsh. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in Marsh. . . .

Lee, 60 L.W. at 4728.

Legislative prayer, as practiced by the United States Congress, the various state legislatures and various other

legislative bodies, such as the Salt Lake City Council and other similarly situated cities and towns, is not violative of the United States Constitution.

II. Legislative Prayer Does Not Violate the Constitution of the State of Utah.

A. Introduction

The First Amendment of the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment, Constitution of the United States.

The comparable, relevant portion of the Constitution of the State of Utah reads as follows:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. . . .

Article I, Section 4, Constitution of Utah.

It is apparent by quick comparison of both constitutional provisions, that the State constitutional provision is more detailed. This was also observed by Justice Crockett in a concurring opinion that interpreted this clause of Utah's Constitution, wherein he stated,

> It seems to me that this case should be decided upon the Constitution and laws of the state of Utah. It is to be noted that the provision of Section 4, Article I, of the Utah Constitution, which our decision quotes, is more articulate and express in assuring religious liberty and prohibiting discrimination, or church interference with private or public rights, than the generality of the First Amendment of the U. S. Constitution.

Manning vs. Sevier County, 517 P.2d 549, at 552, 553 (1973).

In keeping with Justice Crockett's recommendation regarding the application of Section 4 of Article I of Utah's Constitution to questions relating to religious liberty, prohibiting discrimination, and church interference, this court should go beyond the Federal Constitution and look closely at how Utah's Constitution affects legislative prayer.

B. Legislative Intent

A logical starting point in the analysis of any provision of Utah's Constitution is to look at the drafter's intent underlying the questioned provision.

This logical approach appears to be challenged by the Plaintiffs. The Plaintiffs and trial court would have everyone believe that the language of the Utah Constitution is so clear that you need look no further.

However, even a cursory review of the Utah Constitution, with respect to the legislative prayer issue, leads one to question the clarity of the document. The opening words of the Constitution's Preamble are a prayer of thanksgiving:

> Grateful to Almighty God for life and liberty, we the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.

Preamble, Constitution of Utah.

Yet, four short paragraphs later in Section 4 the Plaintiffs assert that there is an absolute, unconditional bar to legislative prayer.

Then, Article VIII, Section 2(2)(c), grants churches a property tax exemption, which financially benefits them.

There is some Utah case law that appears to require uncertainty in the Utah Constitution, before the framers' intent can be reviewed. State vs. Betensen, 378 P.2d 669 (Utah 1963). This required uncertainty appears to be present. While other, more recent, case law simply requires the courts to consider the framers' intent. P.I.E. Emp. Federal Credit Union vs. Bass, 759 P.2d 1144 (Utah 1988). In P.I.E. the court stated:

> When interpreting constitutional language, it is appropriate to look to extrinsic evidence of the framers' intent, (Citations Omitted), including the record of debates during the constitutional convention (Citations Omitted).

P.I.E., 759 P.2d at 1146.

Looking to the framers' intent also allows the courts to use common sense. This has been stated as follows:

> The constitutional provision must be given an interpretation which is sensible and realistic in its application to the affairs of life. To achieve that result it is necessary to look to the background which produced it and the purpose it sought to accomplish.

Gammon vs. Federated Milk Producers Ass'n, Inc., 264 P.2d 417 (Utah 1961).

In order to discern the drafter's intent regarding legislative prayer, the court need not look far. The Constitutional Convention of 1895, met on 55 days. On 54 of those days, the delegates to the convention began their meetings with legislative prayers. Defendants' statement of Undisputed Facts, paragraph 2. The delegates also made it a point to have in their record a demonstration "to the public that a freedom of religious sentiment prevailed in the Convention." Defendants' statement of Undisputed Facts, paragraph 3. This statement, by the delegates, is an affirmation of their intent to have an establishment of religion protection clause, not a ban on legislative prayers.

The practice of legislative prayer was carried on by Utah's first state legislature in 1896. On January 6, 1896, there were two sessions held, a special session and a general session. Both sessions opened with prayers. Defendants' statement of Undisputed Facts, paragraph 13. If the goal of the delegates was to stop all prayers in government meetings and not just to create an establishment protection, then why was there no objection to the new legislature's prayers?

As the court will recall, the Marsh decision, was based, in part, upon the long-standing practice of allowing

legislative prayers, the history of said practice being cited at length in Marsh.

In the case now before the court, the legislative body is not the state legislature, but a city's legislature, i.e., a city council. There is no case law known, wherein a city or town has been forbidden to begin its meetings with legislative prayer, in a state that allows its legislature to begin its sessions with legislative prayer. There is no logical or justifiable reason to treat the state legislature any different than a city legislature.

The purpose of Section 4 was to incorporate an establishment clause protection into Utah's Constitution, and not to implement an absolute, unconditional bar to religious exercises, such as legislative prayers.

Just as was done in Marsh, the court should look at whether having allowed legislative prayer in Utah for the last 96 years has led to the establishment of a state religion. It is common knowledge that the membership of the state's majority religion, as a percent of the whole state's population, is declining. In short, the establishment clause protection provided by Section 4, with the exception for legislative prayers as has existed for the last 96 years, is working. As Justice Goldberg stated in his concurring opinion in Abington School District vs. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), which was cited favorably in Marsh,

> . . . the measure of constitutional adjudication is the ability and willingness

> to distinguish between real threat and mere shadow.

Marsh, 463 U.S. at 795.

Where is the "real threat"? It has not been proven by the Plaintiffs.

The delegates to Utah's Constitutional Convention had no intent to stop legislative prayer when they drafted a detailed establishment clause. Their only intent was to create a workable establishment clause protection for the citizens of Utah. That goal has been accomplished. There is no "real threat" through continued legislative prayers. The trial court's ruling against legislative prayer in the Salt Lake City Council meetings should be overturned and the practice of legislative prayer in those meetings found to be Constitutional.

C. Relevant Utah Case Law Interpretations

There is no Utah decision that has previously interpreted Section 4's establishment clause protection in a situation specifically involving legislative prayer. There are, however, four Utah cases that offer the court some assistance in interpreting Section 4.

In each of these cases, the court has treated Section 4 as an establishment clause protection and not as an absolute prohibition of all religious involvement in a government setting.

The oldest case is Gubler vs. Utah State Teachers' Retirement Board, 192 P.2d 580 (1948), wherein the Utah Supreme Court found no violation of Section 4. The claim was that

Section 4 had been violated because certain teachers that had taught eight years earlier at church run schools were to be allowed increased state retirement fund benefits because of their years of teaching at parochial schools. Thus, the teachers would receive money from the state for their past religious based activities. The court affirmed the State's retirement fund plan, finding no breaches of the wall between church and state. Gubler, 192 P.2d at 587.

Gubler was followed a year later by Thomas vs. Daughters of Utah Pioneers, 197 P.2d 477 (1948), wherein four of the five justices of Utah's Supreme Court found no violation of Section 4, while one did find a violation. In Thomas, the legislature leased a portion of the state capitol grounds to an organization known as the Daughters of Utah Prioneers and provided $150,000.00 to the organization for the construction of a museum that would display Mormon artifacts and portray the history of the Mormon Chruch in Utah. Although the justices did not couch their language in establishment clause terms as they reviewed Section 4, they clearly expressed establishment clause concerns.

There was no bright line, absolutist rule adopted by the court as a whole or by any of its individual members. The key for Justice Pratt was whether there was evidence by the society of proselyting activity. Thomas, 197 P.2d at 490. He concluded there was not; therefore, the lease and money were not a violation of Section 4. Chief Justice McDonough agreed with Justice Pratt, because he could find no evidence of the

organization being involved in propagating the Mormon faith. Thomas, 197 P.2d at 496. Justice Latimer agreed with Justice Pratt, while Justice Wade agreed with Justices McDonough and Latimer. Thomas, 197 P.2d at 498 and 508.

Justice Wolfe dissented because the members of the Daughters might be tempted to carry out an express purpose of the Mormon faith, i.e., to propagate the religion. Thomas, 197 P.2d at 516.

The next interpretation of this subject matter was by the United States Court of Appeals, Tenth Circuit in Anderson vs. Salt Lake City Corporation, 475 F.2d 29, Cert. denied 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973). This case involved a request by the Fraternal Order of Eagles to place a permanent, granite monolith on City and County property, which contained the Ten Commandments and various other religious symbols. The City Commissioners thereafter authorized the installation and maintenance of lighting equipment to illuminate and enhance the display, which would cost a nominal amount of money to operate and maintain.

The court went through a lengthy establishment clause analysis and concluded as follows:

> The wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions. . . . Although an accompanying plaque explaining the secular significance of the Ten Commandments would be appropriate in a constitutional sense, we cannot say that the monument, as it stands, is more than a depiction of a historically

> important monument with both secular and sectarian effects.
>
> No one can be the judge of his own objectivity. It may well be that in this blurred, indistinct area of our national life and environment, opinions about the purpose and effect of the monolith are influenced by orthodox or unorthodox propensities. But be that as it may, we are brought to the conclusion that the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief.

Anderson, 475 F.2d at 34.

The fourth case has been referenced earlier, Manning vs. Sevier County, 517 P.2d 549 (1973), wherein the Utah Supreme Court allowed Sevier County and Richfield City to bond for the purchase of land for and construction of a hospital to be operated by an entity controlled by of the Church of Jesus Christ of Latter-day Saints. There was no dispute that the County and City were bestowing a financial benefit on the operator of the hospital. The Supreme Court, while directly addressing Section 4, concluded that the plan "carefully avoided excessive religious entanglements." Manning, 517 P.2d at 552. The court concluded that all but one aspect of the plan was constitutional.

All four of these cases are treated by the courts as establishment clause cases. No case in Utah establishes a bright line, absolutist view regarding Section 4, as was proposed by the Plaintiffs and adopted by the trial court in this case. All four afforded the citizens of the State of Utah with protection from the establishment of a state religion, while not forbidding all involvement by the state or its statutorily created governmental

units from all involvement with religion.

All four involved the bestowal of some amount of financial benefit on members of a church, on a church, on religion in general, or on a church run hospital. This bestowal of some amount of financial benefit at first glance may appear to contradict the "No public money or property shall be appropriated" language of Section 4. However, when the entire Constitution is reviewed, including the words of the Preamble and Article VIII, in light of its legislative history, then there is no contradiction.

The bestowal of some small amount of financial benefit by the Salt Lake City Council in order to begin its meetings with prayer is not unconstitutional. The use of a minute or two of time; the use of a podium; or the use of a pre-arranged schedule as to who will pray or offer a thought according to non-sectarian guidelines, are not unconstitutional. They are not a "real threat" to the rights of Utah's citizens any more than there was a real threat in the four Utah cases that have just been reviewed.

The trial court's absolutist ruling against legislative prayer in the Salt Lake City Council's meetings or in the meetings of any other Utah city or town should be reversed.

D. Relevant Washington Case Law Interpretation

Washington State's Constitution contains an establishment clause that is similar to Section 4 of Article I

of Utah's Constitution. It reads as follows:

> "Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for, or applied to any religious worhsip, exercise or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony."

Article I, Section 11, Constitution of Washington.

There is no Washington decision that has previously interpreted Washington's Section 11 establishment clause protection in a situation involving legislative prayer. There are a few Washington cases that address the issue of state payments for religious instruction.

In the Washington religious instruction cases, the courts have not treated Washington's Section 11 as an absolute prohibition provision. Instead, they have chosen to treat it in an establishment clause fashion, offering reasonable protection to the state's citizens, which treatment conforms with Utah's past treatment of Utah's constitutional provision.

The most recent case in Washington is Witters vs. State Com'n for the Blind, 771 P.2d 1119 (Wash. 1989). The Witters case began in 1979, when Mr. Witters was denied financial assistance for his education, which was to be conducted at a Christian school with a course of study that would prepare him for a career as a pastor, missionary or youth director. Witters, 771 P.2d at 1120. The case found its way to the United States Supreme Court, which reversed and remanded the matter, concluding that direct financial assistance to an individual did not violate the Federal Constitution pursuant to the Lemon vs. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), but that it needed to be reviewed in light of the "far stricter" Washington State Constitution. 474 U.S. 481, 489, 88 L.Ed.2d 846, 106 S.Ct. 748 (1986).

On remand, the Supreme Court of Washington found that the denial of financial aid to fund an individual's religious education was the Constitutional course. The key issue being that Mr. Witters was seeking to have the State pay for "religious instruction," instruction that was devotional in nature and designed to induce faith and belief in the student. The court ruled that that activity violated Washington's Section 11 prohibition against appropriation for and application to public money for religious instruction. Witters, 771 P.2d at 1122.

Witters court relied on two earlier Washington cases. In State ex rel Dearle vs. Frazier, 173 P. 35 (Wash. 1918), the Washington Supreme Court would not allow a school board to give

high school credits for Bible study done outside of school. In Calvary Bible Presbyterian Church vs. Board of Regents, 436 P.2d 189, Cert. denied 393 U.S. 960, 89 S.Ct. 398, 21 L.Ed.2d 372 (1968), the Washington Supreme Court allowed a state university to teach an English course that reviewed the Bible as literature. The most crucial portion of the court's analysis is the following:

> There can be no doubt that our constitutional bars are absolute against religious instruction and indoctrination in specific religious beliefs or dogma; but they do not proscribe open, free, critical, and scholarly examination of the literature, experiences, and knowledge of mankind.

Calvary, 436 P.2d at 193.

The key to Washington's analysis comes through the question in Calvary that asks if the activity is "religious instruction or indoctrination in specific religious beliefs or dogma?" Calvary, 436 P.2d at 193, and Witters, 771 P.2d at 1122. If the answer is yes, then the activity is constitutionally forbidden. Otherwise, there is no "absolute bar."

Applying this test to legislative prayer as was conducted in the Constitutional Convention in Utah to the Preamble to Utah's Constitution, to legislative prayers in our present state legislature, to the Salt Lake City Council on the date the present action was filed, to the Salt Lake City Council once its written policy was adopted, and to any other similarly situated city or town in Utah, the answer is no.

E. Other Utah Religious Activities

The State of Utah, along with its cities and towns, participates in other religious activities that an absolute separationist view should find unconstitutional. These activities all bestow some amount of financial benefit on religion, which in the Plaintiffs' view should require a finding of unconstitutionality.

Pioneer Day, July 24th, is by statute, a legal holiday. Section 63-13-2, Utah Code Annotated as amended. As Utah's "statehood" or "discovery" or "settlement" day, it does not fall on the dates that Utah joined the union, that Utah was discovered by the colonial powers, or that the first pioneers came into the Salt Lake Valley, July 22, 1847. Instead, the legal holiday recognizes the day that the Mormon Prophet came into the Salt Lake Valley and declared, "This is the right place," which statement arose from his earlier having seen the Salt Lake Valley in a vision.

An absolutist view of Section 4 must clearly require Utah to not celebrate a Mormon phophet's confirmation of a vision. However, Pioneer Day has not been challenged.

Christmas Day, December 25th, is likewise by statute a legal holiday. Section 63-13-2, Utah Code Annotated, as amended. This day is the day that the Christian religion in general celebrates the birth of its Savior, its most sacred day of the year.

An absolutist view of Section 4 must clearly require Utah to not celebrate the Christian religion's most sacred day of

the year. However, Christmas has not been challenged.

Each of these holiday examples bestowes obvious benefits on the Mormon religion or on the Christian religion. It does not make sense to claim that those ecclesiastical organizations are not financially benefited by the government's acceptance of their religious events as legal holidays. However, no one is claiming that the state is in violation of its Constitution by observing these two religious holidays.

The absolutist view proposed by the Plaintiffs and adopted by the trial court should be reversed.

CONCLUSION

Article I, Section 4, of Utah's Constitution was never intended to be an absolute, unconditional bar to legislative prayers in Salt Lake City's council meetings or in any other Utah city or town. The drafters of Utah's Constitution made legislative prayer a part of their actions. There is no reason to believe that the drafters intended anything more by Section 4 than to provide Utah citizens with reasonable establishment clause protection.

Utah's past case law interpretation supports this view, just as does the State of Washington's past case law interpretations of a similar constitutional provision. The absolutist approach proposed by the Plaintiffs would lead to unacceptable restrictions, which were definitely not intended by the drafters and are not necessary to protect the rights of Utah's citizens.

The ruling of the District Court should be reversed. The Court should find against the Plaintiffs and for the Defendants. Legislative prayer at city council meetings should be found to be a constitutionally allowed activity.

DATED this 18th day of August, 1992.

Paul D. Lyman

PAUL D. LYMAN
Attorney for Amicus Curiae

MAILING CERTIFICATE

I hereby certify that a full, true and correct copy of the above and foregoing BRIEF OF AMICUS CURIAE, RICHFIELD CITY, THE UTAH LEAGUE OF CITIES AND TOWNS, ET AL, was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid on the 19th day of August, 1992, addressed as follows:

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